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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

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No. ~~128 Misc.~~

A. ELWOOD NORTH,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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To the Honorable Supreme Court of the United States:

Petitioner prays that a Writ of Certiorari issue to review a judgment of the Supreme Court of Florida, entered in the above-entitled cause on October 21, 1952.

Opinions Below

The opinion of the Supreme Court of Florida is reported in 65 So. 2d 77 (R. 1582). The opinion of the Supreme Court of Florida denying the petition for rehearing is reported at 65 So. 2d 94 (R. 1635). The dissenting opinion is reported at 65 So. 2d 101 (R. 1650).

Jurisdiction

Jurisdiction of this Court is invoked under Title 28, United States Code, Section 1257 (3), this being a case involving rights secured under the Fourteenth Amendment to the Constitution of the United States. Petitioner was convicted of first degree murder in the Circuit Court of Polk County, Florida, and was sentenced to death therefor on October 5, 1951 (R. 1565). That judgment was affirmed by the Supreme Court of Florida on October 21, 1952, Justice Terrell dissenting (R. 1582). Petition for rehearing was denied on April 10, 1953, Justice Terrell and Justice Hobson dissenting (R. 1635-1650). On June 24, 1953, Mr. Justice Jackson issued an order extending the time for filing a petition for a writ of certiorari to August 30, 1953.

The Federal Constitutional questions upon which review is here sought were timely raised in the trial court, particularly by Ground 27 of petitioner's motion for a new trial (R. 1298, 247, 1284, 1286, 1292, 1293, 1294, 1298); upon appeal, particularly by Grounds 20, 21, 23, 26 and 2 of petitioner's Grounds of Appeal (R. 1572-1574, 1569); and by a petition for rehearing, particularly Grounds 23, 24 and 25 thereof (R. 1631, 1632). The judgment of the Supreme Court of Florida affirming petitioner's conviction necessarily involved a determination of those Federal questions adversely to petitioner. Furthermore, in order to eliminate any ambiguity in the record, the Chief Justice of the Supreme Court of Florida has ordered that a Certificate of Clarification executed by him be made a part of the record in this case. This Certificate states that each of the contentions based upon the Federal Constitution and presented to the Florida Supreme Court by the petition for rehearing were "considered and explicitly overruled by said Court by its Order of April 10, 1953, denying the Petition, which Order is to be interpreted and considered

as holding against the Appellant's contention that his rights under the Fourteenth Amendment to the Constitution of the United States were violated" (R. 1665). See *Lisenba* v. *California*, 314 U. S. 219, 221-222.

Questions Presented

Was the petitioner denied a fair and impartial trial conducted in accordance with the procedural safeguards guaranteed by the Due Process Clause of the Fourteenth Amendment when

(1) a religious evangelist was permitted to meet secretly with the jury on two separate occasions during the course of the trial, to address the jury in a manner prejudicial to the petitioner, and to give the jury "divine guidance" against recommending mercy for the petitioner if they found he was guilty;

(2) one of the jurors who brought in a verdict of guilty without recommendation of mercy had already formed a fixed opinion that the petitioner was guilty prior to the trial, which opinion he had repeatedly expressed before the trial, contrary to his testimony on voir dire examination; and

(3) the trial of petitioner was conducted in an atmosphere of passion and prejudice as a consequence of the trial Court's denial of petitioner's motion for a continuance, which motion was made after widespread and inflammatory publicity had made it impossible to secure an impartial jury at that time?

Statement

On July 25, 1951, the Grand Jury of Polk County, Florida, indicted petitioner for the first degree murder of Mrs. Betty Albritton, petitioner's fifty-seven year old business partner and the widow of his late friend and

partner (R. 5). It was charged that the petitioner had inflicted death by beating, choking and assaulting the deceased.

Immediately the press began to give the case an unprecedented amount of publicity unfavorable to petitioner (R. 250, 1574). The permeating and harmful effect of this coverage by the press is disclosed by the statements of the twenty-four jurors examined on voir dire through September 4, 1951 (R. 60-245). Of these, all but one had read about the case in the newspapers and well over half (i.e. fourteen) admitted that they had already formed an opinion concerning petitioner's guilt (R. 62, 81, 105, 113, 126, 146, 153, 172, 176, 195, 205, 214, 230, 236). When the petitioner challenged for cause one of these jurors who, by admission, had already formed an opinion about petitioner's guilt, the trial Court refused to sustain the challenge (R. 153, 158-159).

In this atmosphere, eleven tentative jurors were selected when Court adjourned on September 4, 1951. By agreement of counsel for the State and petitioner, these jurors were permitted to return to their homes for that night (R. 246). The next morning, before Court reconvened, the *Tampa Morning Tribune*, a newspaper of widespread circulation in Polk County, published and distributed a highly inflammatory and prejudicial front-page article (R. 250-a). The headline of the article referred to Mrs. Albritton's "slaying." The question of whether the widow had in fact been slain or had actually died of natural causes was the basic question at issue between the State and petitioner, to be determined at the trial. The article continued, stating that the petitioner had killed his second wife in 1943 with a blast from a pump gun, that the authorities were currently investigating this previous killing, and that the charges against the petitioner included the *poisoning* of Mrs. Albrit-

ton. Since Mrs. Albritton had eaten some candy given to her by petitioner prior to becoming ill on the night of her death (R. 374, 830), the injection of the suspicion of poisoning, which the State never charged, was most injurious, particularly on the question of premeditation.

Convinced that a fair trial could not be had after such an inflammatory article, coming after the most wide spread publicity of a homicide case in Polk County's history (R. 250), petitioner's attorneys moved for a continuance of the trial to a later date "in order that the prejudicial effect of said news article will subside" (R. 251).

Without disputing the factual allegations of the motion, the trial Court summarily denied it (R. 251). Thereafter, upon evidence entirely circumstantial in character, the jury returned a verdict of guilty of first degree murder without recommendation of mercy (R. 1282).

The day after the jury returned its verdict, petitioner learned for the first time, from the local newspaper, that members of the jury had sent "for a minister to call for divine guidance as they considered the case," and that the bailiffs had permitted the Rev. Shelton Jones, a Baptist preacher, to meet with the jury in secret session to provide such guidance (R. 1302).

From other sources, it was also learned that one of the jurors, Juror Bloodworth—who had testified on voir dire that he had neither formed nor expressed an opinion concerning petitioner's guilt (R. 163-164)—had actually repeatedly expressed before trial a fixed and bitter opinion that the petitioner was guilty of the crime charged and should suffer the supreme penalty.

Petitioner made a timely motion for a new trial, based in part upon the above circumstances and the previous denial of his motion for a continuance, and claiming that as a result of these matters his right to a fair and impartial

trial under the Federal Constitution had been violated (R. 1284, 1286, 1293, 1294, 1298). Testimony was taken by the trial Court on the motion. This testimony showed that it was impossible to reconstruct even a semi-accurate picture of what had transpired while the preacher Jones was with the jury. Many jurors stated they did not remember (R. 1515, 1526, 1536, 1542, 1549). However, the testimony of some did establish that one of the jurors was acquainted with the Rev. Jones, who had held evangelistic services at his church (R. 1472); that on two occasions during the trial the bailiffs had allowed the Rev. Jones to meet privately with the jury (R. 1473, 1517, 1542); that this was done in the absence of, without notice to, and without consent of the accused (R. 1486, 1487, 1542); that the Rev. Jones had read to the jury somewhere from the Book of Proverbs in the Bible (R. 1518); that he read "something out of the Bible" (R. 1529); that he read the 37th Psalm to them and stressed the 5th verse thereof out of context (R. 1518, 1474); that he asked for divine guidance of the jurors (R. 1478, 1519); that he asked all the jurors to become Christians (R. 1489), and that he prayed with them (R. 1474).

Portions of Psalm 37, which the evidence clearly showed was read to the jury, are as follows:

> "Fret not thyself because of evildoers, neither be thou envious against the workers of iniquity. *For they shall soon be cut down like the grass, and wither as the green herb.*" V. 1, 2. (Emphasis added.)
>
> "Commit they way unto the Lord; trust also in him; and he shall bring *it* to pass." V. 5. (Emphasis not added.)
>
> ". . . when the wicked are cut off, thou shalt see *it*." V. 34. (Emphasis not added.)
>
> "But the transgressors shall be destroyed together; and the end of the wicked shall be cut off." V. 38.

"But the wicked shall perish, and the enemies of the Lord shall be as the fat of lambs: they shall consume; into smoke shall they consume away." V. 20.

It is now known just exactly what portions of the Book of Proverbs were stressed to the jury by the Rev. Jones. A mere glance at the Book, however, shows that many parts would be highly prejudicial to one on trial for his life. For example:

"But the wicked shall be cut off from the earth, and the transgressors shall be rooted out of it." Ch. 2:22.

"For there shall be no reward to the evil man; the candle of the wicked shall be put out." Ch. 24:20.

"He (the wicked) shall die without instruction; and in the greatness of his folly he shall go astray." Ch. 5:23.

"A man that doth violence to the blood of any person shall flee to the pit; *let no man stay him.*" Ch. 28:17. (Emphasis added.)

In Florida, the question of whether one convicted of first degree murder is sentenced to death or to life imprisonment depends upon whether a majority of the jury recommend mercy. F.S.A. 919.23. In short, the jury decides whether the life of a person they have determined is an "evildoer" shall be "cut down like the grass" or not.

In regard to Juror Bloodworth, the testimony at the hearing upon petitioner's motion disclosed the following:

One witness testified he had heard Bloodworth say, before trial, that he thought petitioner was guilty and "hoped he burnt for it." (R. 1344.)

Another witness testified he had heard Bloodworth say, before trial, that he thought petitioner was guilty and that it would take more arguments than he could see to change it. (R. 1321.)

Another testified to hearing Bloodworth say, before trial,

"North sure as hell killed that woman but he will never be convicted." (R. 1368.)

Still another witness testified that Bloodworth told him, before trial, "Well, I tell you. I think the man (petitioner) is guilty." (R. 1386.)

A fifth witness testified that Bloodworth said, before trial, "I can't serve on that jury because I believe he is guilty. The son of a gun is guilty. All the people in Polk County couldn't change my mind." (AR. 1410.)

Juror Bloodworth did not specifically deny making the above statements. He testified that he did not remember making them (R. 1439, 1440, 1442, 1443, 1444, 1445). He said that he was a barber (R. 1436) and there was "a lot of barbershop gossip going on all the time, so I just wouldn't know of any statement that I made." (R. 1439.) He admitted it was possible that he had expressed before trial an opinion that petitioner was guilty (R. 1445).

The trial court nevertheless denied the motion for a new trial and sentenced the petitioner to death by electrocution. (R. 1564, 1565). On appeal, the Supreme Court of Florida affirmed the judgment and denied a petition for rehearing, two justices dissenting.

Reasons for Granting the Writ

1. By refusing to grant a new trial, the trial Court and the Supreme Court of Florida have held that a man's life may be taken from him by procedures fundamentally unfair and contrary to the very concept of justice as understood in Anglo-American jurisdictions. Cf. *Rochin* v. *California*, 342 U.S. 165. The action of an officer of the trial Court, in permitting a preacher to give "divine guidance" to the jury during its deliberations, without the knowledge of the accused and beyond his presence, is no more nor less than a reversion to the practices followed by medieval ecclesiastical tribunals, long since condemned and universally decried by

civilized, English-speaking peoples of today. Due process of law commands that no accused shall be sent to his death in this day and age and in this Nation by such a practice.

2. The Sixth Amendment to the Federal Constitution specifically provides that an accused shall enjoy the right to a public trial, by an *impartial* jury, and to be *confronted* with the witnesses against him. It is submitted that these particular rights expressed in the Sixth Amendment are basic to and implicit in the concept of ordered liberty, particularly where a man is on trial for his life. *Re Oliver*, 333 U.S. 257; *Tumey* v. *Ohio*, 273 U.S. 510; *Snyder* v. *Massachusetts*, 291 U.S. 97, 106. As such, these rights are protected by the Due Process Clause of the Fourteenth Amendment against infringement by the States. *Palko* v. *Connecticut*, 302 U.S. 319; *Adamson* v. *California*, 332 U.S. 46, 54. By permitting a preacher to address the jury in this case behind closed doors and in the absence of the accused, petitioner's rights under the Fourteenth Amendment to a public trial, to confront the witnesses against him, and to an impartial jury were denied.

3. Petitioner's right under the Fourteenth Amendment to an impartial jury was denied by the trial Court's refusal to grant petitioner's motion for a continuance and by the presence on the jury of Juror Bloodworth, who had falsely stated on voir dire examination that he had no opinion and had expressed no opinion concerning petitioner's guilt.

4. In view of the above, the Florida Supreme Court has decided important Federal Constitutional questions in a way contrary to applicable decisions of this Court. At the very least, serious questions concerning the limitations of the Due Process Clause of the Fourteenth Amendment upon the conduct of criminal proceedings by the States are raised. The resolution of these questions by this Court will be of importance not merely to petitioner, but to the administration of justice throughout the Nation.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

This case concerns basic procedural safeguards for the protection of those accused of crime—safeguards which have been deeply cherished and almost uniformly followed in Anglo-American jurisdictions. Without them, the administration of justice in the United States is not only more apt to suffer from actual abuse; it will necessarily be degraded by the mere appearance of unfairness. Specifically, these safeguards are the following:

1. The right of an accused to a public trial in open court. *Re Oliver*, 333 U. S. 257.
2. The right of an accused to confront and examine witnesses against him. *Re Oliver, supra; Snyder* v. *Massachusetts*, 291 U. S. 97, 106; *Shepherd* v. *Florida*, 341 U. S. 50, 52, concurring opinion.
3. The right of an accused to be tried by an impartial or neutral tribunal. *Tumey* v. *Ohio*, 273 U. S. 510; see *Fay* v. *New York*, 332 U. S. 261, 289.

These are rights which no totalitarian dictatorship can afford to indulge; they are rights no nation dedicated to personal liberty can afford to revoke.

Petitioner's right to a public trial in open court and to confront those who spoke against him was denied by the action of an officer of the trial court, the bailiff, in permitting a religious evangelist to address the jury in secret on two occasions, without notice to the accused and out of his presence. Petitioner's right to be tried by an impartial tribunal was denied by the presence of Juror Bloodworth on the jury and by the action of the trial court in denying petitioner's motion for a continuance.

Despite these drastic departures from traditional Anglo-American safeguards, the Supreme Court of Florida has affirmed petitioner's conviction and his sentence to death. In doing so, the Supreme Court of Florida relied upon its

conclusion that the appearance of the Rev. Jones before the jury on two occasions had no effect upon the jury and that therefore the petitioner was not prejudiced by a practice which the Court conceded "cannot be too severely condemned" and which it described as "irregular". 65 So. 2d 77, 86. This conclusion, we respectfully submit, was a mere speculative assumption based upon inadequate factual information and unwarranted by the record. This Court, of course, is not bound by such a conclusion.

> "In cases in which there is a claim of denial of rights under the Federal Constitution, this Court is not bound by conclusions of lower courts, but will re-examine the evidentiary basis on which those conclusions are based."
>
> *Niemotko* v. *Maryland*, 340 U. S. 268, 271; see also *Feiner* v. *New York*, 340 U. S. 315, 316.

A re-examination of the evidentiary basis in the record in this case clearly shows, first of all, that neither this Court, the lower courts, nor petitioner will ever know the complete story of what took place behind the closed doors of the jury room while Rev. Jones was addressing his remarks to the jury. This is not because of any lack of diligence upon petitioner's part to dig out every fragment of information he could concering those secret sessions. It results from that common human fraility: forgetfulness. A mere perusal of the record shows that juror after juror, when asked days later what the Rev. Jones had said to them, simply replied, "I couldn't tell you to save my life" (R. 1515), or "I don't remember his exact remarks" (R. 1518).

This inability to reconstruct exactly what occurred is not surprising. It is the natural and inevitable consequence whenever a departure is made from this Nation's accepted practice of conducting criminal trials in open court with notice to the accused so that he may be present to confront

those who speak against him, and so that his counsel may cross-examine and meet the opposition "with evidence, arguments, and requests for instructions, and at least preserve his objections on the record." *Shepherd* v. *Florida*, 341 U. S. 50, 52, concurring opinion.

In this case, of course, petitioner had no opportunity to object, to cross-examine the Rev. Jones, to request instructions, or to counteract in any way the influence which the evangelistic preacher may well have exerted upon the jury. Petitioner did not learn of the secret meetings until after the jury had brought in its verdict of guilty without recommendation of mercy. Surely, if the trial Court itself had expressly permitted the Rev. Jones, over petitioner's objection, to retire behind closed doors with the jury and address them out of petitioner's presence, the denial of due process would be patent. *Re Oliver, supra.* Yet even such obvious error by the trial Court would not have so completely stripped petitioner of all his rights or left him so helpless as did the high-handed, hidden action of the bailiff in this case.

Moreover, the record shows without contradiction that highly prejudicial matters were spoken to the jury by the Rev. Jones. Several jurors agreed, for example, that the Rev. Jones read them a Psalm, clearly identified by one as the 37th (R. 1518, 1474). Thus, as a man of God giving divine guidance, the Rev. Jones chose to stress to the jury a passage from the Bible replete with statements that evildoers should be "cut down", that "transgressors shall be destroyed", that "the wicked shall perish", and that the wicked shall "consume away" into "smoke". He stressed the fifth verse particularly, which counsels that the Lord "shall bring *it* to pass."

What effect this guidance of the Rev. Jones may have had upon the jury's determination that petitioner was

guilty of the crime charged, we can only surmise. But the effect upon their decision not to recommend mercy for petitioner, once having decided he was an "evildoer", is obvious. Had not the Reverend Jones given them divine guidance that "the wicked shall perish" and "be destroyed"?

Other jurors testified that the Rev. Jones had read from the Bible, and had read from the Book of Proverbs in the Old Testament (R. 1529, 1518, 1536). It was not possible to ascertain precisely which passages were stressed. Presumably it could have been anything in the Bible, from the command in Exodus 21 that for punishment "thou shalt give life for life, eye for eye, tooth for tooth" to the statement in Romans 6:23, "For the wages of sin *is* death."

In dismissing petitioner's contention that such passages from the Bible, stressed out of context, may have influenced the jury against recommending mercy, the Florida Supreme Court simply declared, flatly: "If harmless error did not influence the jury in determining the guilt of the appellant, then it could not influence it in recommending mercy." 65 So. 2d at pp. 100-101. Why not? Respectfully, petitioner must confess his inability to follow the Court's logic. Moreover, this inability and bewilderment is only heightened by another decision of the same Court rendered in a non-capital case only a few days prior to the opinion on rehearing in this case. *Raines* v. *State*, 65 So. 2d 588. In the *Raines* case the trial court, after the jury had been deliberating upon its verdict, excused the jury to go to their respective homes over night and return next morning to renew their deliberations. This was done in open court, and there was no objection made by the defendant or his counsel. Reversing the conviction on the ground that the defendant's trial had not been "conducted with that

degree of fairness and security that the bill of rights contemplates," the Florida Supreme Court then stated:

> "* * * There was no objection raised when the jury was dispersed, nor were counsel consulted. There is no showing in the way of evidence that defendant's rights were prejudiced, *but trials should not be conducted in a way that defendant has good reason for the belief that he was deprived of fundamental rights.* The opportunity was open for tampering with the jury and the temptation to do so was such that *we are not convinced that the appellant's trial was conducted with that degree of fairness and security that the bill of rights contemplates.* * * * It imposes too great a burden upon the defendant to produce evidence of prejudice to his rights under such circumstances. We think this error calls for reversal." 65 So. 2d at pp. 559-560. (Emphasis added.)

Surely the Bill of Rights, as applied to the States by the Fourteenth Amendment, does not contemplate one standard of fairness and security for defendants in non-capital cases and another, lower standard for those accused of more serious crimes in capital cases.

On the basis of the above, it is submitted that petitioner's Federal Constitutional rights have clearly been denied. He asserted these rights at the first possible moment in the trial Court by his motion for a new trial, particularly Ground 27 thereof (R. 1298); on appeal, particularly by Grounds 20, 21, 23, 26 and 2 (R. 1572-1574, 1569); and by his petition for rehearings, particularly Grounds 23, 24 and 25 thereof (R. 1631, 1632). The Supreme Court of Florida fully considered petitioner's contentions based upon the Fourteenth Amendment and denied each of them, as evidenced by the Certificate of Clarification executed by the Chief Justice of that Court (R. 1665). Petitioner now respectfully prays that a Writ of Certiorari be directed to

the Supreme Court of Florida, in order that the errors complained of may be reviewed and corrected.

This — day of August, 1953.

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